IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FLOORING CREATIONS BY ART FLOOR, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No.: 2000-08-184
GABRIELLA LEDLEY,	)	
Defendant.	)	

Date Submitted: February 11, 2002
Date Decided: March 1, 2002

Gerald Proffit, Esquire
2 Gates Circle, Suite 200
Hockessin, DE 19707
Attorney for Plaintiff

John R. Weaver, Esquire
831 North Tatnall Street,
Wilmington, DE 19801
Attorney for Defendant

FINAL ORDER AND DECISION

Trial in the above captioned matter took place on Friday, February 11, 2002. Following the receipt of evidence and testimony the Court reserved decision. This is the final order and decision by the Court.

The action is for breach of contract action seeking compensatory damages for defendant's alleged refusal to allow plaintiffs to complete a contract for tile, carpet and flooring at defendants' residence. Plaintiff ("Flooring Creations") alleges that the defendant breached the contract and is seeking damages for the labor and supplies which plaintiff purchased and could not otherwise install or proceed to contract

completion. Defendant Gabrielle Ledley, ("Mrs. Ledley") has denied liability and filed a counter-claim. In Ledley's counter-claim she seeks to have compensatory damages awarded because defendant allegedly refused to complete the job. Ledley also alleges that the tile work that was, in fact, completed was "insufficiently completed" and/or installed in an "unworkmanlike."

For the reasons set forth below the Court enters judgment in defendant's favor. As to defendant's counterclaim, the Court enters judgment in plaintiff's favor. Each party shall bear their own costs.

The Facts

The Court finds the following relevant facts presented at trial. Raymond Renai ("Renai") is an employee of Art Floor for the past forty years and supervised the contract for tile, carpet and hardwood installation ("flooring installation") worked at defendant's residence. In November 1999 Renai requested his secretary prepare, and he reviewed, a contract for flooring installation at the defendants residence at 108 Sheehan Drive in Middletown, DE 19709, ("the residence").[1]

The contract called for first floor ceramic tile to be installed in defendant's kitchen; hall and sunroom; first floor bathroom; Jacuzzi and shower stall; second floor bathroom floor tile; the installation of "Wonder Board"; sand all plywood joints; and install nine hundred (900) square feet of maple hardwood flooring with "natural color". The contract also

[1] See plaintiffs exhibit "1"

called for one hundred sixty one (161) yards of carpet installation at $26 per yard with "maiden hair" color. The total contract price was $28,062. The contract required a $12,000 deposit to be made by the defendant leaving a $16,062 balance. Both parties signed the contract[2].[3]

At trial Renai testified two other employees of Floor Creations were on the job site. Mr. Hutchinson did the kitchen work and Mr. D'Angelo did "some of the other work" in the bathroom upstairs. Francis Hall ("Hall") was "called in to satisfy the defendants" with regard to repair work at the residence Renai requested by the defendant and Renai. Renai supplied a separate list to Hall.

Renai described at trial the procedure for installing of the tile, which including the use of "Wonder Board" as well as sealing the joints with compound and tape over the composition board and or sub-floor. The tile work at defendant's residence was completed according to Renai "within a reasonable time".[4]

---

[2] The signatures on the contract were Gabrielle Ledley and Raymond Renai on behalf of Flooring Creations.

[3] Plaintiff's exhibit "2" was introduced into evidence without objection. This document is a statement of what plaintiff's believe is balance due under the contract. This balance included labor to install hardwood for $1,350; labor to install carpet $322; pad for $322 and a deposit of $12,000 with a balance from the $28,062 contract price and damages sought in the complaint is $14,068. Plaintiff's exhibit "3" was moved into evidence without objection and is a purchase order constituting $2,970 for hardwood floor; an invoice from Superior Products for polyurethane and other products totaling $3,186.35. Plaintiff's exhibit "4" was a purchase order for Coronet Carpets in the amount of $2,402.31 and carpet rolls for $125 and an additional invoice for $1,146. Finally, plaintiff's exhibit "5" was moved into evidence which were phone calls from a cell phone by handwritten note by Mr. Renai.

[4] Renai at trial testified there are "ten to twelve ways" to install sub-floor and tile, but that Renai used Wonder Board because it was "called for by the defendant" and "commonly used". According to Renai the "old mud way" could not be used because there was not sufficient foundation to support the flooring.

The contract was not completed with regard to the carpet installation and hardwood floors because Renai was waiting for the "go ahead" from the defendant, which he "never received". Renai later learned that Ledley had another contractor install the hardwood and carpet in her residence. According to Renai he was "refused entry into the property several times" by Mrs. Ledley and only later did he learn that another contractor installed the carpet and hardwood floor.

Renai conceded at trial that "small minutia type contract items" had not been satisfied and the letter he received from Robert Ledley on February 28, 1999 documented Mrs. Ledley's concerns with regard to these items. Renai testified that had he been given the opportunity to enter the Ledley residence, re-inspect, and complete the necessary repairs the items outlined in the February 28, 1999 letter would have been satisfied.[5]

John D'Angelo ("D'Angelo") testified at trial. D'Angelo is now self-employed and performed some of the tile installation work at defendant's residence. D'Angelo's previous experience included ceramic tile marble installation for the past twenty years. D'Angelo installed the tile at the Ledley residence in November 1999 and was "on the job two weeks". Mrs. Ledley was at the property every day speaking with him and "she had no complaints" about the quality or quantity of his work. Mrs.

[5] Renai also believed that Wonder Board was the "best solution" for this property and instructed Francis Hall to do whatever necessary to satisfy the Ledley's concerns.

Ledley did note the bathroom tub upstairs was "crooked and installed improperly", but D'Angelo advised her promptly that it was not his responsibility because he did not install the tub. When he left the property Mrs. Ledley informed D'Angelo that she was "satisfied with his work."

Aotin Hutchinson ("Hutchinson") testified at trial. Hutchinson is a tile setter and has been doing installation work for twenty-five years. Hutchinson installed tile work at the Ledley residence in the kitchen, powder room, hall and dining room. Mrs. Ledley observed his work for six days. According to Hutchinson, Mrs. Ledley voiced problems and complaints about other contractors work, but that her complaints did not concern his tile installation work. When he left the property, Mrs. Ledley said, "Thanks for the nice job".

Hall presented testimony at trial. He has been a tile installer and/or setter for fifty years and did the repair work for Mrs. Renai at her residence. Hall believed that he satisfied Mrs. Ledley with his repair work as she always "appeared very happy" when he completed the requested repair work by Renai or Mrs. Ledley. The repairs involved four different calendar days at the residence for a total of twenty hours of repair work.[6]

[6] Hall did repair work in the master bedroom, laundry room, powder room, hallway and second floor bedroom and received a punch list from Mr. Renai as well as a list from Mrs. Ledley satisfactorily completed all the repairs.

Robert M. McCutcheon presented testimony at trial. He is employed by SS Home as a tile installer and was present at the Ledley property during the work. McCutcheon understood Wonder Board was used for the subject property and is "one grade up" from the normal installation of tile foundation. His testimony was that the parties were in a constant dispute and each party was "tearing their hair out" during the performance of the contract at the Ledley residence.

The defense presented its case in chief. Robert Ledley resides at the subject property and introduced through his counsel defense exhibit "1" and "2" which were diagrams of the first and second floor of the subject property. Defendants moved into evidence without objection thirty-nine photographs. Following the introduction of each photograph which depicted allegedly insufficient or poor quality work Mr. Ledley placed an orange sticker on defendant's exhibit "1" and "2" to mark in the Ledley residence the deficient tile work was allegedly installed. Most of the pictures depicted tile installation work that Mr. Ledley believed was insufficient in quality. A review of most of the photographs were hair line fractures in different areas of the tile installation.

Ledley showed the Court through various photographs he had taken of certain gaps under the toilet, gaps under the bottom of the shower on door thresholds and door jams, all of which allegedly depicted what Mr. Ledley believed to be "insufficient quality work." Ledley also took pictures of the kitchen area, door jams and the laundry room tile

area where allegedly the pictures showed a gap between the floor and the tile.[7]

Mr. Ledley conceded on cross examination that the carpenters on the job site installed much of the quarter round molding and door jam work in the house before the tile could be installed over the objection of the plaintiff. Mr. Ledley agreed that carpentry work caused the gaps between the tile and wood.

Gabrielle Ledley ("Mrs. Ledley") was sworn and testified. Mrs. Ledley believes it will cost $41,000 to do the tile repair and installation work she seeks in her counterclaim. Mrs. Ledley testified she wants all the tile installed by Flooring Creations "ripped out" and replaced. Her testimony was offered in lieu of an expert at trial.

According to both Mr. and Mrs. Ledley they received a phone call after installation of the tile work from Renai who told them both individually by phone on the same date "I do not want to do anymore of the work as to either the carpet or the hardwood". Both Mrs. Ledley and Mr. Ledley considered that plaintiff had abandoned the work. Mrs. Ledley testified that Renai first called her and asked for her husband's phone number and Mr. Ledley at work. Mr. Ledley confirmed that Renai specifically abandoned the property; that Renai informed him he was "fed

[7] Upon reviewing most of these photographs including the upstairs photographs although there were some problems with the caulk in areas between tiles and some hair line fractures, most of the thirty nine pictures depicted problems with caulk, cracking and gaps, almost not visible to the naked eye after reviewing at the pictures the alleged quality of work that Ledley believed was deficient. Admittedly there was "gaps" between the tile and molding in certain areas, but as discussed herein, the carpenter installed "quarter board" in floor molding before the tile installation could be completed.

up" and that Renai no longer wanted to complete the job or the contract, including all carpet and tile installation which was not yet completed.

On rebuttal Renai was recalled to testify. His version of the phone calls with defendant and her husband was that there was tile work located near the Jacuzzi which was cracked and caulked, but that he could repair that area as well as all other tile that was depicted in the 39 photographs. Renai believed that had he been able to enter the Ledley residence that he would have been able to perform the necessary repairs and correct any deficiencies depicted in the 39 photographs received into evidence.

The Law

When there is a written contract, the plain language of a contract will be given its plain meaning. Phillips Home Builders v. The Travelers Ins. Co., Del. Super., 700 A.2d 127, 129 (1997). The party first guilty of material breach of contract cannot complain if the other party subsequently refuses to perform. Hudson v. D.V. Mason Contractors, Inc., Del. Super., 252 A.2d 166, 170 (1969). In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract. Emmett Hickman Co. v. Emilio Capano Developer, Inc., Del. Super., 251 A.2d 571, 573 (1969). Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that party would have been in had the breach not occurred. Delaware Limousine Service, Inc. v. Royal

Limousine Svc., Inc., Del. Super., C.A. No. 87C-FE 104, Goldstein, Jr., 1991 WL 53449 (April 5, 1991).

At the same time, however, a party has a duty to mitigate once a material breach of contract occurs. Lowe v. Bennett, Del. Super., 1994 WL 750378, Graves, J. (December 29, 1994). Whether a breach is material and justifies non-performance is a matter of degree and "is determined by weighing the consequences in light of the contract". Eastern Electric & Heating v. Pike Creek Professional Center, Del. Super., 1987 WL 9610 (April 7, 1987).

Decision And Order

Based upon the totality of evidence received into the record at trial, the Court finds the plaintiff has failed to prove beyond a preponderance of evidence that defendant breached the contract. Reynolds v. Reynolds, Del. Super., 237 A.2d 708, 711 (1967); Guthridge v. Pen-Mod, Inc., Del. Super., 239 A.2d 709, 713 (1967); Gibson v. Gillespie, Del. Super., 152 A.2d 589 (1928). Plaintiff drafted the contract and if there is an ambiguity in the terms or drafting of the contract, "that ambiguity will be resolved against the party [plaintiff] who drafted the contract". See, E.I. du Pont de Nemours & Co. v. Shell Oil Co., Del. Super., 498 A2d 1108 (1985). Clearly the contract terms called for a contingency, which was payment of the balance due upon completion of the contract. The Court finds that based upon the record presented at trial that Renai's phone call after the installation of the tile to Mr. and Mrs. Ledley allowed

defendant to discharge her responsibilities and rescind the contract because Renai repudiated performance.

As set forth in Citisteel USA, Inc., v. Connell Limited Partnership, Levia Brothers Division, Del. Super., 798 A2d 928 (2001), "A repudiation is a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damage of total breach". Restatement Second, Contracts §250 (1981). [U]nder Delaware law, a repudiation is an outright refusal by a party to perform a contract or its conditions entitling "the other contracting party to treat the contract as rescinded". Sheehan v. Hepburn, Del. Ch. 37 Del. Ch. 90, 138 A2d 810 (1958).

Clearly Renai's phone calls to the defendant and her husband that he no longer wished to perform the balance of the contract constituted a repudiation allowing Mrs. Renai to be discharged from further performance under the contract which was proven by a preponderance of evidence at trial. Hence, the defendant was entitled to rescind the contract and excused the contingency for final payment.

With regard to credibility of the witnesses the Court must reconcile the conflicts in the testimony and give credibility to the witnesses who Court finds most credible. McCutcheon presented testimony at trial and was allegedly the sole impartial and independent fact witness that clearly explained the parties were "at odds" and "were pulling their hair out" during the portion of the contract that was, in fact, performed. The

Court finds that it was reasonable for the defendant to conclude the contract was repudiated based upon the contents of Renai's phone calls to defendant and her husband. McCutcheon's testimony added credibility to the existence and terms of the Renai phone call because of what appeared to the Court to be a somewhat tumultuous relationship between the parties during the contract performance.

With regard to defendant's counterclaim alleging that plaintiffs breached the implied warranty of good workmanship, the Court finds this warranty does not apply to the facts of this case.

As set forth in Council of Unit Owners of Breakwater House Condominium, et al., v. Shore Building Supply, Inc., Del. Super., 1993 Lexis 80 (February 18, 1993) the warranty of good quality and workmanship arises "by operation of law" and covers only "latent defects", or those defects of which a buyer had no actual knowledge". See also Tyus v. Resta, Pa. Super., 476 A.2d 427 (1984); Griffin v. Wheeler Leonard & Co., Inc., N.C. Super., 225 S.E.2d 557 (1976); Meadowood Condo. v. South Burlington, Vt. Super., 565 A.2d 238 (1989); "Latent defects "are those which are not obvious or not discoverable by a reasonable inspection". Tyus v. Resta, supra. Clearly all 39 photographs depicted alleged defects that were clearly discoverable, although not clearly depicted by photographs because of the size of the alleged cracks.

With regards to defendant's counter-claim the Court finds based upon the totality of evidence presented at trial that the counter-claim was not proven by preponderance of evidence. Most of the alleged substandard work which depicted in the thirty-nine photographs introduced into evidence by defendant are minor quality defects that plaintiff could have repaired if given the opportunity by the Ledley's. As noted above, however, Renai's phone call to Mrs. Ledley excused further performance under the terms of the contract. No expert testimony was presented at trial to contradict what appeared to be minor defects caused by the setting of the tile and/or minor defects that could have been corrected around the door jams and/or molding.

The Court has viewed all 39 photographs, most of which do not depict deficient work that the naked eye can view, such as hairline cracks in the tile. Mr. Ledley conceded that the carpenters on the job site installed moldings and "quarter round" before the tile work could be installed, with no fault of plaintiff. The Court cannot find by preponderance of evidence that requires that all the tile installed by plaintiff be "ripped out" and reinstalled at a cost in excess of $41,000. Mrs. Ledley also expressed satisfaction to plaintiff's employees during the contract performance. Absent some evidence other than what is depicted in the 39 photographs, defendant has not met her burden. The Court enters judgment in favor of the plaintiff on defendant's counter-claim.

Each party shall bear their own costs.

IT IS SO ORDERED this First day of March, 2002.

_____

John K. Welch
Associate Judge